IN THE

Supreme Court of the United States

October Term, 1956

No. 34

WILLIAM J. KERNAN, Administrator of the Estate of Arthur E. Milan, Deceased, and JOHN J. MEEHAN, Administrator of the Estate of Donald H. Worrell, Deceased,

Petitioners,

v.

AMERICAN DREDGING COMPANY, as Owner of the Tug "Arthur N. Herron", In the Matter of the Petition for Exoneration from or Limitation of Liability,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

ABRAHAM E. FREEDMAN,
1415 Walnut Street,
Philadelphia 2, Penna.
Counsel for Petitioners.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Respondent's brief is designed to create a diversion from the real issue herein, as set forth in the petition.

The stage is set by contending that petitioner seeks to fasten liability upon the innocent respondent because of the negligence of some third party. To support and emphasize this point, respondent says that the Trial Judge found that "the *cause* of the fire was" (and here respondent extracts the following excerpt from the Court's findings):

> "The ignition of highly inflammable vapor lying above an extensive accumulation of some petroleum product spread over the surface of the river."

An examination of the Court's finding (p. 16, App. to Petition) discloses that *the sentence does not end at that point.* On the contrary, that excerpt is only a prelude to the most important and significant part of the Court's finding. Instead of a period after the word "river", there is a comma, and the finding continues:

> ". . . which *was touched off by an open flame kerosene lantern carried on the deck of the scow* at its rear port corner." (Emphasis supplied.)

This deletion distorted the clear finding of the Court and was intended to make it appear that respondent played no part in causing the conflagration. In truth, the Court found to the contrary—that it was respondent's act in bringing the open flame into contact with the petroleum vapors which caused the fire.

It is the vessel's unsafe and unseaworthy condition, created by the open flame, which is alleged as the basis for the liability, and not a negligent act of any third person. It has not been established from which of the refineries along the banks of the Schuylkill River the gas might have come. However, that is wholly immaterial. It would appear that respondent introduced the subject solely to draw attention from its own gross dereliction in navigating the barge with an open flame into the petroleum refinery area where inflammable vapors are not uncommon.

Did the Court Below Base Its Decision Upon the Premise That Fault or Knowledge of a Dangerous Condition Is Essential to Establish Liability Under the Warranty of Seaworthiness?

Respondent now asserts that the Court below did not so hold, and charges that the quotation from the Court's opinion, which is set out in the petition, is taken out of context. One would expect that respondent, having made such a serious charge, would then point to that part of the Court's opinion which qualifies the quotation, or at very least inform this Court wherein the quotation is inadequate or misleading. Respondent failed to do either, and for good and obvious reason: the quotation in the petition is a full and complete statement of the Court's finding and it is not qualified or modified by any other part of the Court's opinion, which includes the findings. The full text of the opinion is printed in the appendix to the petition and the quote will be found on page 18. This Court will see at once that the quote contains the full finding on this point.

It is significant that respondent should now deny the basis for the Court's decision, and it would seem that this indicates recognition by the respondent of the fact that the issue which has been posed by the petition is of such importance as to warrant a review by this Court. Indeed, even a cursory examination of the Court's finding on this point

discloses that the decision below is in clear conflict with a settled and important principle of law laid down by this Court. A brief reference to the Court's opinion proves the point.

After considering the effect of the violation of the Coast Guard regulation, the Court below undertook consideration of the issues of "unseaworthiness" and "negligence" and proceeded to treat them as one and the same, without any distinction. Here are the words from the Court's opinion (Petition, p. 18):

> "This brings us to the question whether, apart from any question of failure to observe a regulation, there was commonlaw negligence or *unseaworthiness* under the general maritime law. The lanterns carried were open flame kerosene lights of a proper and suitable type. It is true that the Schuylkill River has on its banks several refineries and facilities for oil storage and for loading and unloading petroleum products, but there is no evidence that the river at this point is, or ever has been, considered a danger area, so that it would be negligent for a ship to carry open flame lanterns at a height of three feet above the water, and I find that there was no *negligence* in doing so." (Emphasis supplied.)

This finding relates to *unseaworthiness* as well as *negligence*, and the Court expressly found that there was no unseaworthiness because there was no negligence. Respondent, having persuaded the Court below to this erroneous proposition, now seeks to divert the attention of this Court from that basic issue.

This erroneous principle of law has not been limited by the Court below to this case. In *Cookingham v. United States*, 184 F. 2d 213, a seaman was injured as a result of an unsafe place due to the existence of a dangerous foreign substance on a stairway. The same Trial Judge held there

was no negligence and no unseaworthiness because it was not proven that the shipowner knew of the condition and had an opportunity to repair it. The Court of Appeals below, again by a divided court, affirmed Judge Kirkpatrick's opinion. This decision has been sharply criticised. In *Pacific Far East Lines, Inc. v. Williams*, 234 F. 2d 378, the Court of Appeals for the Ninth Circuit took the direct contrary view. The *Cookingham* doctrine was even more strongly repudiated in the Second Circuit, in *Poignant v. United States*, 225 F. 2d 595. There Circuit Judge Frank, concurring, had this to say about the novel theory which the Third Circuit Court of Appeals has adopted in connection with the warranty of seaworthiness (p. 603):

> "The Third Circuit has since interpreted its Cookingham 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d 784, 789-790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cookingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that court holds, demands reasonable care only. See Brabazon v. Belships Co., 3 Cir., 202 F. 2d 904, 906. *I think that distinction directly at odds with the Supreme Court's decisions.* I read my colleagues' opinion as repudiating it also." (Emphasis supplied.)

It is that same theory which the majority of the Court below has applied to the case at bar. That theory is, as Judge Frank stated, in direct conflict with the rule of this Court.

It is noteworthy, also, that upon petition for rehearing three judges in the Court below dissented in the instant case.

A review by this Court should be granted to correct the error into which the Court below has fallen, before it takes root and brings uncertainty and confusion in the interpretation of the warranty of seaworthiness.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioners.